

107 FERC ¶ 61,279
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suede G. Kelly.

John C. Jones

Project No. 6132-009

ORDER MODIFYING SURRENDER OF EXEMPTION
AND FINDING SURRENDER EFFECTIVE

(Issued June 18, 2004)

1. By order issued June 28, 2002, the Commission approved the surrender by John C. Jones of his exemption for the John C. Jones Project No. 6132, located on the North Branch of Marsh Stream in the towns of Winterport and Frankfort, in Waldo County, Maine, and the removal of the project facilities. 99 FERC ¶ 61,372 (2002). We are modifying that order to delete removal of the project facilities as a condition of the surrender and finding the surrender effective.

I. Background

2. On July 11, 2001, Facilitators Improving Salmonid Habitat (FISH), then the exemptee of the John C. Jones Project, filed an application to surrender its exemption and to remove the project structures. The project and exemption were later transferred to John C. Jones, who assumed the surrender application. Jones proposed to remove the entire project, including the dam, the powerhouse, a fishway, and an asphalt parking area. The generation of electricity had ceased at the project in 2000, and the exemptee had removed the single generating unit, the main gate, and trashracks in 2001.¹

3. The application was supported by state and federal fisheries agencies and the Penobscot Indian Nation, which, collectively, favored restoring the stream to a natural free-flowing condition, enabling passage for anadromous and resident fish species, and opening up salmon spawning habitat above the dam site. The Towns of Winterport and Frankfort and a number of local residents opposed the removal of the project dam, for reasons including possible disruption of the existing ecosystem, increased erosion and ice

¹ 99 FERC ¶ 61,372 at P 7 and 62,583 (Environmental Assessment).

flow damage, loss of the impoundment for fire control and recreational opportunities, harm to property values, and reduced water quality in Marsh Stream.

4. In a final environmental assessment (EA), which was appended to our surrender order, Commission staff found that dam removal would have beneficial effects on fish passage and habitat, without causing significant adverse environmental effects in the areas about which the opponents expressed concern. Relying on this evaluation, we approved the surrender application and authorized removal of the project facilities in accordance with a removal plan that was contained in the application. Ordering paragraph (F) provided that surrender of the exemption would become effective upon a Commission finding that project removal and other related actions had been satisfactorily completed. In a subsequent order, issued August 5, 2002, we denied a request filed by the Towns of Winterport and Frankfort for a stay of the proceedings for six months to enable them to explore acquiring the dam by eminent domain. 100 FERC ¶ 61,165 (2002).

5. By letter of August 6, 2002, the Commission's New York Regional Office, after reviewing documentation submitted by Jones in accordance with the conditions of the surrender order, authorized Jones to proceed with project removal. However, by letter of September 11, 2002, the Director, Office of Energy Projects, informed Jones of letters submitted by the Towns indicating that they purported to have taken and condemned, pursuant to Maine law, a conservation easement that provided the property right to remove the dam. Because the Towns' purported condemnation called into question whether Jones held the necessary property rights to remove the dam, a determination within the authority of the State of Maine, the Director temporarily rescinded the Regional Office's authorization. The Director explained that the rescission did not reverse the Commission's surrender order, and that the Commission staff would be in a position to decide how next to proceed once it had more information about recently initiated state legal processes regarding this property issue.

6. By letter of September 22, 2003, to Jones, the Director noted that, in the year following his letter rescinding the Regional Office's authorization, the state and local ownership issues, including attempts by the Towns to acquire the dam by eminent domain, had not been resolved. Accordingly, the Director rescinded his September 11, 2002 letter and reinstated the Regional Office's authorization to begin dam removal in accordance with the surrender order. However, the Director cautioned Jones that he would have to possess the necessary property rights under state law to remove the project. Consistent with the provisions of the surrender order, the Director stated that the surrender of the exemption would not become effective until the Commission determined that the approved actions had been satisfactorily completed. Jones did not take any action to remove the project facilities in response to this letter.

7. On January 6, 2004, the Towns filed with the Commission a settlement agreement entered into by Jones and the Towns. Under the agreement, the Towns agree to cease efforts to take any property or interests of Jones by eminent domain, while Jones agrees not to remove the dam, allow it to be removed, or sell it without the prior written consent of the Towns. The agreement provides for Jones to petition the Commission to amend the previously granted surrender request to ask that the dam not be removed. In letters to the Commission dated January 19 and February 5, 2004, Jones stated that he had entered into the agreement to avoid the eminent domain action against his property, and that he could not consider withdrawing his request to remove the dam without assurances from affected State and Federal agencies that no compliance responsibilities would be enforced against him, at his expense, regarding safety, liability, maintenance of the dam, and fish passage.

II. Discussion

8. As we noted in our surrender order, exemptees are free to surrender their exemptions and subsequently pursue any course of action they wish with respect to the previously exempted dam and other project works.² In the present case, the exemptee requested authority to remove the project facilities, including the dam, as part of the surrender of the exemption. Although the EA recommended surrender with dam removal, it also analyzed the alternative of accepting the surrender and leaving the dam and reservoir in their current state.³

9. In approving surrender and authorizing removal of the project facilities, we anticipated that dam removal would be imminent, and, indeed, it had been scheduled to commence in September 2002, within 3 months of the issuance of our order. The delay resulting from the property rights dispute has created a situation in which the project remains under the Commission's jurisdiction although it is not generating electricity, and in which the effectiveness of the surrender has been postponed far longer than we had contemplated. Now, by entering into an agreement that commits him to leave the project dam in place, Jones has essentially given notice that he will not fulfill the dam removal condition of the exemption surrender.

10. Under these circumstances, our failure to take additional action would prolong the retention of this project under Commission jurisdiction indefinitely, since the dam removal condition would not be satisfied. Such a continuation of the present situation is

² Id. at P 8.

³ Id. at 62,583 (EA).

neither necessary nor in the public interest. The EA concluded that surrender with the dam left in its present condition, with the main gate removed and the reservoir fluctuating,⁴ would have insignificant effects with regard to erosion, historic resources, visual and cultural resources, fire-fighting, and flooding. There would be only a minor adverse effect on recreation, owing to the fluctuating impoundment. Upstream fish migration would continue to be impeded, but the long-term effect on fisheries resources would not be significant.⁵ Therefore, allowing the surrender to be effective without removal of the project facilities would not have significant adverse environmental effects.⁶

11. Consequently, we will construe Jones' action as an implied withdrawal of the request for authorization to remove the project facilities, and we will modify our surrender order to the extent that it states or implies that removal of the project facilities must occur before the surrender of the exemption will be effective. The surrender will be effective upon issuance of the present order. Once the surrender is effective, Jones will have no further obligations with respect to the Commission. Because the State of Maine will have jurisdiction over the dam and other project facilities,⁷ Jones may be subject to state regulatory requirements and laws with regard to those facilities.⁸

⁴ The level of the reservoir fluctuates by approximately 8 to 10 feet with the main gate removed. *Id.* at 62,584 (EA). The fluctuation is a function of inflow to the reservoir.

⁵ *Id.* at 62,589 (EA).

⁶ The agreement provides for Jones to restore and maintain the impoundment "insofar as practicable in the same manner as previously existed." Such actions, if they were to be undertaken, would occur after the termination of Commission jurisdiction and would be independent of our action here.

⁷ The pertinent state agency is aware of the project's condition and has expressed no concerns about the state exercising its jurisdiction following surrender.

⁸ The Maine Department of Environmental Protection issued water quality certification in connection with the proposed action, and Ordering Paragraph (E) of our surrender order made removal of the project facilities subject to the conditions of the certification. However, under section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a), water quality certification is required only if a proposed activity would result in a discharge into the waters of the United States. Such a discharge would be created by removal of the dam but not by mere surrender of an exemption. As we are no longer authorizing dam removal, no discharge will occur, and the conditions of the water quality certification no longer apply.

12. Our modified disposition of the surrender application does not itself preclude the subsequent taking of any action, such as restoration of the dam and impoundment, dam removal, or the provision of fish passage, at the project site. It simply defers decisions concerning any such actions to resolution in a state forum.

The Commission orders:

(A) The surrender of the exemption held by John C. Jones for the John C. Jones Project No. 6132, which surrender was approved by Commission order issued June 28, 2002, in this proceeding, is effective on the issuance date of the present order.

(B) Any conditions specified in our order of June 28, 2002, that relate to the removal of project facilities, and that have not been satisfied as of the date of issuance of this order, are removed as conditions precedent to the effectiveness of the surrender.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.